STATE OF MICHIGAN

COURT OF APPEALS

SEAN McBRIDE,

Plaintiff-Appellee,

v

PINKERTON'S, INC., d/b/a PINKERTON SECURITY & INVESTIGATION SERVICES,

Defendant-Cross-Plaintiff-Appellee,

and

PM ONE, LTD., d/b/a PM DIVERSIFIED,

Defendant-Cross-Defendant-Appellant,

and

METROPOLITAN REALTY CORP.,

Defendant.

UNPUBLISHED
July 2, 1999

No. 202147
Wayne Circuit Court
LC No. 94-422938 NO

SEAN McBRIDE,

Plaintiff-Appellee/Cross-Appellant,

v

PINKERTON'S, INC., d/b/a PINKERTON SECURITY & INVESTIGATION SERVICES,

Defendant-Cross-Plaintiff-

No. 202204
Wayne Circuit Court
LC No. 94-422938 NO

Appellant/Cross-Appellee,

and

PM ONE, LTD., d/b/a PM DIVERSIFIED,

Defendant-Cross-Defendant-
Appellee/Cross-Appellee,

and

METROPOLITAN REALTY CORP.,

Defendant-Appellee/Cross-Appellee.

Before: Young, Jr., P.J., and Murphy and Hoekstra, JJ.

YOUNG, JR., P.J. (concurring).

I concur only in the result reached by the lead opinion. I write separately regarding part I to explain the basis for my belief that Pinkerton owed a legal duty to plaintiff to perform its security services with reasonable care and that it was for the jury to determine whether that duty was breached under the facts of this case and whether such a breach proximately caused plaintiff's injury. I also write separately regarding part VIII to explain the basis for my belief that, in light of *Samson v Saginaw Professional Bldg, Inc*, 393 Mich 393; 224 NW2d 843 (1975), the trial court erred in granting summary disposition to PM and Metro.

I

Regarding Pinkerton's tort liability, the lead opinion correctly states that this Court and our Supreme Court both have accepted § 324A of the Restatement of Torts, 2d as an accurate statement of Michigan law. See, e.g., *Blackwell v Citizens Ins Co of America*, 457 Mich 662; 579 NW2d 889 (1998); *Smith v Allendale Mutual Ins Co*, 410 Mich 685; 303 NW2d 702 (1981); *Courtright v Design Irrigation, Inc*, 210 Mich App 528; 534 NW2d 181 (1995). Indeed, § 324A appears to be based on the common-law rule "that accompanying every contract is a [] duty to perform with ordinary care the thing to be done, and that a negligent performance constitutes a tort as well as a breach of contract." *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967); see also *Courtright*, *supra* at 530-531. In the third-party context, the rule has been stated as follows: "Those foreseeably injured by the negligent performance of a contractual undertaking are owed [] a duty of care." *Talucci v Archambault*, 20 Mich App 153, 161; 173 NW2d 740 (1969); see also *Tucker v Sandlin*, 126 Mich App 701, 704-705; 337 NW2d 637 (1983) (relying in part on § 324A to impose on the defendant a duty to third parties to perform security guard services with reasonable care). This common-law duty of care exists separately and apart from the contract. See *Talucci, supra*; *Osman v*

Summer Green Lawn Care, Inc, 209 Mich App 703, 707-708; 532 NW2d 186 (1995). Accordingly, on the basis of these authorities, I agree with the lead opinion that Pinkerton had a duty to exercise reasonable care in rendering the services to which it agreed in its security contract with PM. Relevant to this case was Pinkerton's contractual responsibility to prevent unauthorized access to the building. I further agree that it was for the jury to decide whether Pinkerton breached that duty and whether such a breach proximately caused plaintiff's injury. Therefore, the trial court properly denied Pinkerton's motion for judgment notwithstanding the verdict.

II

Turning to the liability of PM and Metro, the lead opinion states in part VIII:

> Although a landlord is not an insurer of the safety of its tenants - nor do we believe it ever could be - a landlord is nonetheless obligated to see that the common areas are reasonably safe for the use of its tenants, *Samson* [*v Saginaw Professional Building, Inc*, 393 Mich 393, 407; 224 NW2d 843 (1975),] an obligation that includes protecting tenants from the foreseeable criminal activities of third parties, *Holland* [*v Leidel*, 197 Mich App 60; 494 NW2d 772 (1992).]

I agree that our Supreme Court's decision in *Sampson*, *supra*, established a duty on the part of landlords to take reasonable measures to ensure that common areas are reasonably safe for tenants. Moreover, the duty recognized in *Samson* applies to the prevention of criminal assaults that present a foreseeable as well as unreasonable risk of harm. This is so even though the facts in *Samson* were somewhat unusual in that the danger of criminal assaults in that case was claimed to have been created by the fact that the landlord rented a portion of its premises to a state mental health clinic. Finally, and most important to my analysis of PM and Metro's potential liability in this case, the *Samson* Court stated that it preferred to leave it "to the jury to determine the ultimate questions which may impose liability, those of foreseeability, reasonableness and proximate cause." *Id*. at 409.

Notwithstanding *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495; 418 NW2d 381 (1988), and *Scott v Harper Recreation, Inc*, 444 Mich 441; 506 NW2d 857 (1993), which decisions appear to be limited to the merchant-invitee context, I conclude that the principles of *Samson* control the basic duty owed by landlords to their tenants in this context. Indeed, the Supreme Court in *Williams*, *supra* at 502 n 17, described its *Samson* decision as upholding "a landlord's duty to investigate and take available preventive measures when informed by his tenants that a possible dangerous condition exists in the common areas of the building." Further, the Court in *Scott*, *supra* at 452 n 15, cautioned that it was reserving its opinion "regarding the application, in the area of landlord-tenant law, of the principles discussed in the present case." However, because I believe that the policy concerns recognized in *Williams* and *Scott* are equally applicable in the landlord-tenant context, I urge the Court to revisit *Samson* in light of those policies.

I further acknowledge that a panel of this Court in *Stanley v Town Square Cooperative*, 203 Mich App 143; 512 NW2d 51 (1993), purported to limit the duty recognized in *Samson*. The *Stanley* Court stated that a landlord's duty to exercise reasonable care "exists only when the landlord created a

dangerous [physical] condition that enhances the likelihood of exposure to criminal assaults." *Id*. at 150; see also *Bryant v Brannen*, 180 Mich App 87, 97-98; 446 NW2d 847 (1989) (holding that a landlord may be liable only "to the extent that foreseeable criminal acts are facilitated by his failure to keep the physical premises under his control reasonably safe.") However, the panel in *Stanley* failed even to acknowledge the Supreme Court's decision in *Samson* (despite the fact that Judge Wahls cited *Samson* in his dissenting opinion in *Stanley*). It cannot be gainsaid that we are obligated to follow controlling Supreme Court precedent until the Supreme Court itself overrules that precedent. *Boyd v W G Wade Shows*, 443 Mich 525, 523; 505 NW2d 544 (1993). While *Stanley*'s proposition that a landlord's liability should be limited to physical defects in the premises has some appeal, our Supreme Court's decision in *Samson* clearly precludes such a holding.

In this case, plaintiff submitted evidence in response to the motion for summary disposition that PM and Metro were made aware of prior criminal activity in the building and that tenants had raised various security issues concerning unauthorized access. Therefore, the remaining issue under *Samson* was whether the decision by PM and Metro to employ Pinkerton, a nationally renowned, licensed security guard service, was reasonable under the circumstances. Under *Samson*, this was a question for the jury to decide.

/s/ Robert P. Young, Jr.